STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2013-CP-21-00690
Appellate Case No. 2016-001551

Christy Bryd, as Next Friend of Julia B., a minor,

Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

Respondents would restate the issues on appeal as:

I. Did the Trial Court properly deny the Plaintiff's motion for a directed verdict on the limitation of medical malpractice liability provided for in the emergency medical and obstetrical care statute, S.C. Code Ann. § 15-32-230, where the evidence created a jury question on each of the three elements, to wit:

   A. It is undisputed that the presentation of shoulder dystocia constituted "a genuine emergency situation;"

   B. There was conflicting evidence as to whether the Mother and/or Infant's condition was "not medically stable;" and

   C. There was conflicting evidence as to whether the Mother and/or Infant was "in immediate threat of death" or "in immediate threat of serious bodily injury."

ADDITIONAL SUSTAINING GROUND

II. Is the Defendant Physician entitled to judgment from any personal liability pursuant to S.C. Code Ann. § 33-56-180, because he was employed by a charitable organization and the jury found that he was not grossly negligent?

STATEMENT OF THE CASE

This is a medical malpractice action arising out of the labor and delivery of a baby girl, Julia B. (hereinafter referred to as Infant) on October 9, 2009. Her mother, Christy Byrd (hereinafter referred to as Patient or Mother), brought this action on behalf of her minor child, seeking damages for a permanent brachial plexus nerve injury that the Infant suffered during delivery. She filed a summons and complaint on March 12, 2013, alleging that her Obstetrician, Dr. John B. Browning and his practice (hereinafter referred to as Dr. Browning or the Obstetrician) failed to properly manage and resolve a presentation of shoulder dystocia which occurred during the delivery. [ROA ___; Complaint.] The Plaintiff named Dr. Browning's practice as McLeod Physician Associates II, and Dr. John B. Browning d/b/a McLeod OB-GYN Associates. At trial, the Defendants presented evidence that Dr. Browning was employed by McLeod Physician Associates II at the time of the delivery, and that the practice was a §501(c)(3) charitable corporation.[1] [ROA ___; Tr. 607:13-24.]

Dr. Browning filed an answer which was later amended, by which the Defendants deny the allegations of negligence and assert various defenses, including the limitation on liability found in the Emergency Medical Obstetrical Care Exception found in S.C. Code Ann. §15-32-230. The Defendants also asserted the limitation of liability for charitable corporations as found in S.C. Code Ann. §33-56-180. [ROA ___, ___; Answer, 05/10/2013; Amended Answer, filed 4/16/14.]

The case first came to trial before the Honorable Eugene C. Griffith, Jr., and a jury in the Florence County Court of Common Pleas on September 22-25, 2015. After five days of trial, the trial court was forced to declare a mistrial when the Plaintiff's expert rebuttal witness testified on

[1]Pursuant to S.C. Code Ann. § 33-56-180, certain limitations on liability apply to charitable organizations.

direct examination by Plaintiff's counsel that "... we [obstetricians] should apologize and make amends and compensate, and that's why we have insurance." [ROA ___; Ct. Ex. # 20, p. 247:18-21.]

The case came for retrial before the Honorable William Seals, and jury on May 16-20, 2016. The Defendants moved for a directed verdict at the close of the Plaintiff's case and moved pursuant to §33-56-180 to dismiss Dr. Browning individually and limit liability and strike punitive damages. [ROA ___-___; Tr. 523-25.] The Trial Court found that Dr. Browning's employer at the time of the incident which is the subject matter of this action was McLeod Physician Associates II. [ROA ___; Tr. 622:18-22.] Accordingly, the Trial Court granted the directed verdict motion to limit liability and strike punitive damages as to McLeod Physicians Associates II and otherwise denied the motions. [ROA ___-___; Tr. 628:7-10.] At the close of the Defendants' case, both parties moved for directed verdicts and the motions were denied. [ROA ___-___; Tr. 1102-03.] After the Plaintiff's rebuttal witness, both parties renewed their motions for directed verdict which were denied. [ROA ___-___; Tr. 1163-64.]

The Trial Court charged the jury on the Emergency Medical Obstetrical Care Exception, §15-32-230, [ROA ___; Tr. 1245:16-25], and presented a verdict form to the jury with special interrogatories. The jury returned a verdict for Dr. Browning, finding as to the Obstetrical Medical Emergency Exception, that "the Defendants prove[d] by a greater weight or preponderance of the evidence that the facts of this case arise out of a genuine emergency situation where the patient is not medically stable and there is an immediate threat of death or serious bodily injury." Having so found that the exception applied, the jury was instructed by the charge and the verdict form that the plaintiff was required to prove gross negligence. The jury found that Dr. Browning did not "act

in manner that was grossly negligent." [ROA ___; Verdict.] The jury did not reach the issue of whether Dr. Browning deviated from the standard of care.

After the jury was released, the Trial Court granted the Plaintiff 10 days to file post-trial motions. [ROA __, ___; Tr. 1265:10-12, Judgment, filed May 20, 2016.] The Plaintiff filed a motion for a new trial absolute and/or a judgment notwithstanding the verdict on May 31, 2016. [ROA ___; Motion.] The Trial Court issued its order on July 11, 2016, denying the motion. [ROA ___; Order.] The Plaintiff served a Notice of Appeal on July 26, 2016. [ROA ___; NOA.]

STATEMENT OF THE FACTS

Medical Evidence of the Obstetrical Emergency during Labor and Delivery

Christy Byrd was a long-standing patient of Dr. Browning who had delivered her first two children. Her prenatal care proceeded without problems and she was admitted to McLeod Regional Medical Center for labor and delivery on October 8, 2009. Labor progressed without incident until it was time for the head to deliver. At that point, Dr. Browning recognized that they were facing two emergencies: (1) the nuchal cord was wrapped around the Infant's neck, and (2) shoulder dystocia. [ROA ___; Tr. 669, 674.] Dr. Browning successfully removed the cord, but that left him still facing the genuine emergency of shoulder dystocia. [ROA ___; Tr. 669.]

Shoulder dystocia is when the baby's head delivers, but the shoulder gets stuck under the pubic bone. [ROA ___; Tr. 283.] As the Plaintiff's expert put it: "[A] shoulder dystocia is basically a stuck shoulder." [ROA ___; Tr. 283:24-25.] Plaintiff acknowledged and the obstetrical experts agree that shoulder dystocia is an unpredictable and unpreventable risk to any pregnancy. [ROA ___, ___; Tr. 149, 354, 361, 660, 894.] One of the learned treatises identified at trial even refers to it as an "obstetric nightmare." [ROA ___; Tr. 928. *See also* ROA ___; Court Ex. # 11 - *Shoulder Dystocia: An Evidence-Based Evaluation of an Obstetric Nightmare.*]

Dr. Browning and the hospital nurses immediately took the appropriate measures to address this medical emergency and delivered the Infant within 45 seconds. First, they performed a McRoberts maneuver by hyperflexing the Mother's thighs to change her position. Dr. Browning told the Mother to stop pushing briefly and he applied controlled axial traction which did not resolve the stuck shoulder. He then instructed the hospital nurse to apply suprapubic pressure while he again applied controlled axial traction which was unsuccessful in dislodging the shoulder. Dr. Browning observed that the nurse's effort in applying the pressure was limited by her position and directed her to climb on a chair to provide better leverage, and with that change in position, the nurse's second effort at suprapubic pressure was effective and the Infant was delivered. [ROA ___, ___-___, ___; Tr. 648:4-18, 650:24-651:1, 674:5-15.]

There was only 45 seconds from the delivery of the head to the delivery of the body. [ROA ___; Tr. 343:1.] Part of the delivery was recorded on a personal video camera by the Mother's aunt. The video CD(s) were admitted as Plaintiff's Ex. # 2 & 3. [ROA ___; Exhibits to be transferred to the Court.] However, the camera angle from the foot of the bed did not capture everything that was going on and the aunt stopped recording when the head was coming out. [ROA ___, ___-___; Tr. 258, 262-63.] In addition, it is apparent the sound quality is compromised by the general clamor and many voices in the delivery room.

Fortunately, with the relatively quick delivery, the Infant did not suffer from oxygen deprivation. [*See* ROA ___, ___, ___; Tr. 347:15, 578:14-17, 835:3-7.] However, the baby did have decreased movement on the right side. [ROA ___; Tr. 346:13-23.] It was later determined that the Infant suffered an upper brachial plexus injury. [ROA ___; Tr. 222:19-20.] The Infant eventually had surgical reconstruction of her shoulder and she showed significant improvement

afterwards. She does still suffer some permanent impairment of her right upper extremity. [ROA ___, ___, ___; Tr. 223-24, 236, Tr. 501.]

Expert Opinions on the Standard of Care

Both Plaintiff's and Defense expert obstetricians agreed on the standard of care for the first two steps in resolving a shoulder dystocia. The first step is to place the mother in the McRoberts position.[2] The second step is for an assistant/nurse to apply suprapubic pressure.[3] [ROA ___-___, ___, ___, ___, ___; Tr. 284-85, 355 (Pliskow), Tr. 794, 820 (Smithson), Tr. 897 (Ernest).] According to the Plaintiff's expert, if those maneuvers are not successful, the next steps include various fetal/internal maneuvers which include a Rubin's maneuver, Wood's maneuver, or if necessary, there are even extreme measures of breaking the infant's clavicle or pushing the baby back in and performing a cesarean section. [ROA ___-___; Tr. 292-295;

Plaintiff's obstetrical expert, Dr. Pliskow, opined that Dr. Browning violated standards of care in several particulars: (1) failure to stop the Mother from pushing while the shoulder was stuck; (2) failure to correct the nurse who was performing the suprapubic pressure incorrectly by pushing on the pubic bone[4], and (3) use of brute force in applying lateral traction instead of moving

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[2] "McRoberts position is where the knee is bent, the hip is flexed or pulled back onto the body where the knee is touching the abdomen. The legs are usually pointing toward the shoulder, the maternal shoulder, and pulled back as far as they can be pulled back without, obviously, injuring the mom." [ROA ___; Tr. 284:20-25.] "[H]aving your legs up in the flexed position." [ROA ___; Tr. 535:10-11.]

[3] "[S]o one of the assistants will place pressure to the maternal abdomen. It's never at the top. It's always just above or suprapubic, above the pubic bone, right where the shoulder is because that's where the shoulder is stuck right above the pubic bone...." [ROA ___; Tr. 285:13-17.] [H]aving the nurse exert pressure on the abdomen." [ROA ___; Tr. 535:13-14.]

[444] Notably, the Plaintiff elected not to sue the nurse or the hospital for which she worked, and Plaintiff did not even call her to testify at trial. The only evidence from the nurse was indirect

on to rotational maneuvers when the McRoberts and suprapubic pressure did not work. [ROA ___; Tr. 304-09, 344.]

Dr. Browning testified that he did get the Mother to stop pushing during the maneuvers. [ROA ___, ___; Tr. 687:18-25, 712:5.] Dr. Browning also testified that that he did not see the nurse applying pressure to the pubic bone, but he did instruct the nurse to change her position in applying the suprapubic pressure which was effective in resolving the dystocia.[5] [ROA ___; Tr. 647-48.] As to the traction, Dr. Browning testified that he used controlled/careful axial traction – not "brute force." [ROA ___, ___-___, ___; Tr. 677:15-16, 691:25-692:1, 698:23-25.]

Dr. Smithson, a Defense obstetrical expert, testified that Dr. Browning used appropriate and reasonable axial traction: "In this particular case, based on the evidence, it was normal gentle axial traction that was applied." [ROA ___; Tr. 818:19-20. See also ROA ___; Tr. 801:9-18.] Dr. Ernest, the other Defense expert,[6] testified similarly that: "[Dr. Browning] applied appropriate traction, which is called axial traction. It was very clear on the video. It was a straightforward delivery, appropriately managed with axial traction. There was no abnormal traction or bending of the head at all." [ROA ___; Tr. 1003:5-9.]

Ultimately, Dr. Smithson opined that Dr. Browning met the standard of care with regard to the delivery of the Infant and that he did not cause her injuries. [ROA ___; Tr. 780-81, 861-862.]

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through the experts that relied on her deposition testimony in rendering their opinions. Despite the fact that this State does not follow the "captain of the ship" doctrine of vicarious liability in medical malpractice actions, the Plaintiff still attempted to impose liability on the Obstetrician for the assisting nurse on a failure to supervise theory. *See* Ellis by Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996) (captain of the ship doctrine discredited and not recognized).

[5] The Defense expert, Dr. Smithson, testified that even if the nurse was pressing on the pubic bone, it would not have caused any injury to the baby. [ROA ___-___; Tr. 804:18 -805:7.]

[6]Dr. Ernest was qualified as an expert in the field of obstetrics and the medical literature on shoulder dystocia. [ROA ___; Tr. 882.]

Likewise, Dr. Ernest opined that Dr. Browning "met the standard of care in everything he did," and "he did not cause the injuries." [ROA ___-___; Tr. 884:18-885:4.]

Evidence of the Medical Instability and the Immediate Threat to the Infant

The key issues on appeal concern whether the patients (Mother and Infant) were not medically stable and in immediate threat of death or serious injury during the shoulder dystocia emergency. All of the medical expert opinion evidence establishes that the shoulder dystocia was an emergency and that time was of the essence in delivering the Infant because it was only a matter of minutes before the Infant would have suffered brain damage or death. While the Plaintiff concedes that the shoulder dystocia was a medical emergency, her experts opined that the Infant and Mother were medically stable and there was no risk during the 45 seconds that it took Dr. Browning to resolve the emergency and deliver the Infant. In contrast, Defense experts opine that the Infant was not medically stable and that the risk was real and immediate even during those 45 seconds because it was unknown whether the shoulder dystocia could be resolved and how long it would take. The details of these opinions are discussed in detail below.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE PLAINTIFF'S MOTION FOR A DIRECTED VERDICT ON THE LIMITATION OF MEDICAL MALPRACTICE LIABILITY PROVIDED FOR IN THE EMERGENCY MEDICAL AND OBSTETRICAL CARE STATUTE, S.C. CODE ANN. § 15-32-230, WHERE THE EVIDENCE CREATED A JURY QUESTION ON EACH OF THE THREE ELEMENTS.

Directed Verdict Standard of Review

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. South Carolina Dep't of Highways & Pub.

Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994); *see also* McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "A jury issue exists where the evidence is susceptible of more than one reasonable inference." Jones v. Ridgely Commc'ns, Inc., 304 S.C. 452, 454, 405 S.E.2d 402, 403 (1991). The Appellate Court applies the same standard. O'Leary-Payne v. R.R. Hilton Head, II, 371 S.C. 340, 347–48, 638 S.E.2d 96, 100 (Ct. App. 2006).

Applicable Law – Limitation on Liability for Emergency Obstetrical Care

The South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-230, provides:

> **Emergency medical and obstetrical care exceptions.**
>
> (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.
>
> (B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.
>
> (C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:
>
> (1) in immediate threat of death; or
>
> (2) in immediate threat of serious bodily injury.
>
> Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

The limitation on liability is an affirmative defense and, as such, the defendant physician has the burden of proving that the limitation applied, then the plaintiff patient bears the burden of proving gross negligence. Strange v. S.C. Dept. of Highways & Pub. Transp., 445 S.E.2d at 440

("The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense."); James v. Lister, 331 S.C. 277, 283, 500 S.E.2d 198, 201 (Ct. App. 1998) (holding that the limitation on liability for charitable organizations, section 33–55–210(A) constitutes an affirmative defense); Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (governmental entity's burden to establish that the limitation on liability applied, and plaintiff's burden to establish gross negligence).

On appeal, the Plaintiff complains that the Legislature did not define the terms "genuine emergency," "medically stable," or "immediate threat." [Appellant's Brief, p. 8.] The Plaintiff also ruminates about other academic questions which she asks the Court "to answer to provide guidance to the bench and bar. Without guidance, an expert is free to define and construe the statute in whatever manner best suits the needs of the party retaining his services." [*Id.*] None of these questions are before this Court on appeal because they were not preserved below and they are not properly raised in this appeal. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.") More fundamentally, the Appellate Courts are not in the business of rendering advisory opinions or rewriting statutes. Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."); Brunson v. Stewart, 345 S.C. 283, 287, 547 S.E.2d 504, 506 (Ct. App. 2001) ("It is beyond this Court's power to effect a change in the statutes enacted by the Legislature.").

The Trial Court charged the jury on the §15-32-230 exception as follows:

> In an action involving medical malpractice -- in a medical malpractice claim arising out of care rendered in a genuine emergency situation in an obstetrician suite where

> the patient is not stable and there is an immediate threat of death or serious bodily harm to the patient, no physician may be held liable unless it is proven that the physician was grossly negligent. In regards to this emergency exception, the defendant must prove this by the preponderance or greater weight of the evidence. [ROA ___; Tr. 1245:16-24.]

The Plaintiff did not except to the charge.[7] The only question preserved below and raised on appeal is as to the sufficiency of the evidence on the issues of whether (1) the patients were not medically stable, and (2) the patients were in immediate threat of death or serious bodily injury.

The Plaintiff argues paradoxically that while the Infant might have become medically unstable if enough time had passed, the Emergency Obstetrical Care Exception does not apply because Dr. Browning delivered the Infant before she became unstable. While the statute speaks of "a genuine emergency," "immediate threat" and "not medically stable" as seemingly separate elements, the medical opinion testimony of record overlaps and conflicts. The Trial Court properly denied the directed verdict motion and submitted the issues to the jury where the Plaintiff concedes that the presentation of shoulder dystocia constituted "a genuine emergency situation," and where there was conflicting evidence on the issues of medical instability and the immediate threat to the Mother and the Infant.

A. The Plaintiff concedes that the presentation of shoulder dystocia constituted "a genuine emergency situation."

It is undisputed that the presentation of shoulder dystocia constituted "a genuine emergency situation." In opening statement, Plaintiff's Counsel declared that: "[I]n a shoulder dystocia situation, when the shoulder gets stuck, it is considered an emergency." [ROA ___; Tr. 149:1-2.] Both Plaintiffs' and Defendants' experts testified that shoulder dystocia is a medical emergency. [ROA ___, ___, ___, ___, ___, ___; Tr. 354 (Dr. Pliskow), 549 (Dr. Resnick), 667 (Dr. Browning),

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[7] MR. RUFFIN: I'm okay with the charge, yes. [ROA ___; Tr. 1040:2. *See also* ROA ___; Tr. 1254:6.]

788 (Dr. Smithson), 895 (Dr. Ernest). 1155 (Dr. Strickland).] On appeal, Appellant concedes "this claim arose out of care rendered in a genuine emergency situation and that the patient received care in an obstetrical suite." [Appellant's Brief, p. 11.]

B. The evidence created a question of fact for the jury as to whether the Infant and Mother were "not medically stable."

Plaintiff's obstetrical expert, Dr. Pliskow, testified that there was never a time throughout the labor and delivery when either the Mother or the Infant were not medically stable. [ROA ___-___; Tr. 349-50.] However, his testimony was based, at least in part, on the post-delivery APGAR and blood gas studies from after the Infant was delivered, and he acknowledged that Dr. Browning could not have had a complete picture of how the delivery would progress [ROA ___; Tr. 359.] Neither the "fine" results of the Infant's post-delivery APGARs and cord blood gases nor the "real time" fetal monitor strips can justify taking the question from the jury when the medical experts disagree on the key issue of whether she was medically stable in the midst of the emergency.

Plaintiff's expert in the field of pediatric neurology, Dr. Resnick, testified that the Infant was not at risk of being potentially medically unstable for about 10 minutes, and that the Infant (and Mother) were medically stable during the 45 seconds it took to deliver the baby. [ROA ___, ___; Tr. 578:20-24, 584:2-12.] However, Dr. Resnick acknowledged that shoulder dystocia is a "medically unstable situation." Although he equivocated about the Infant being "potentially unstable," [ROA ___; Tr. 580:6-15], Dr. Resnick also acknowledged that the Infant was not medically stable because it could suffer brain damage or even death if the shoulder was not dislodged:

> Q: So when you're confronted or you have a medical emergency, it -- it's reasonable that the patient isn't medically stable? Is that a true statement?
> ....
> A: Yes.

Q: Thank you. So you know because if the shoulder is not dislodged, that the baby could unfortunately suffer brain damage or even death; right?

A: Yes. [ROA ___; Tr. 549:14-24.]

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Q: Okay. So at the time that the shoulder dystocia recognized and we agree it is a medical emergency?

A: Correct.

Q: That is a medically unstable situation –

A: Correct. [ROA ___; Tr. 582:4-8.]

In support of her argument that she was entitled to a directed verdict, the Plaintiff attempts to latch onto isolated testimony from Dr. Browning and his experts that in ***hindsight*** the Infant was medically stable in those 45 seconds. [ROA ___; Tr. 732:5-7 (Browning).] However, Dr. Browning did not have the benefit of the APGARs and cord blood gases during the 45 seconds that he was working through the steps to resolve the shoulder dystocia emergency:

Q: So when does a doctor ever practice medicine or deliver a baby with the benefit of hindsight?

A: Obviously, none. [ROA ___; Tr. 668:22-24. *See also* ROA ___; Tr. 859:22-24 (Smithson). ROA ___; Tr. 934:13-17 (Ernest).]

Similarly, Dr. Smithson, the Defense OB expert, testified that: "In hindsight. Of course, we can say that the baby's Apgars were fine. The blood gases revealed some minor abnormalities, but in hindsight we can say that the baby was medically stable. In the midst of a delivery, you cannot say that." [ROA ___; Tr. 835:3-7.] Dr. Ernest, the other Defense OB expert, even explained that the fetal monitor strips were not a definitive indicator of the Infant's stability during delivery:

If you talk about a particular part of the baby, is the heart rate stable? Well, the baby's heart rate was stable; so there was a medically stable heart rate. If you talk about the brain, during the 45 seconds of this delivery, the baby's brain was

> medically stable, but if you look at the big picture, it was a medically unstable condition. [ROA ___; Tr. 898:13-18.]
>
> ****
>
> There are medically stable parts of the baby and, again, we talked about this in my deposition, but the overall situation is a medically unstable one. [ROA ___; Tr. 899:12-14.]

Moreover, Dr. Duchowny, Defense expert pediatric neurologist, testified without any equivocation that the Infant was not medically stable:

> Q: Now, when the shoulder dystocia was presented or was recognized during the delivery of Julia [B.], was she medically stable at that time?
>
> A: Well, actually I think she was in a very dangerous situation. There was immediate risk of either bodily harm or death. It's a very precarious situation and, in my opinion, very potentially dangerous. [ROA ___; Tr. 1060:22 -1061:3.]

On the record as a whole, there are conflicting expert opinions about whether the Infant was medical stable or not. The Plaintiff did not object to the admissibility of these Defense expert opinions; thus, any question as to the basis of their opinions goes to their credibility which is properly a question for the jury. Weaver v. Lentz, 348 S.C. 672, 680, 561 S.E.2d 360, 364 (Ct. App. 2002)

Dr. Browning's testimony that ***in hindsight*** the Infant was medically stable simply is not determinative and does not entitle the Plaintiff to judgment as a matter of law in the face of his testimony as a whole and the opinions of the other experts. Bonds v. Nesbitt, 322 Ga. App. 852, 747 S.E.2d 40, 45 (2013) ("A doctor's determination that a patient has stabilized is some evidence that the patient has in fact stabilized," but the question is for the trier of fact.). It is not the Appellate Court's place to resolve conflicts in the evidence – that is the jury's responsibility. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) ("When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence."). Even where a witness'

testimony is conflicting, the jury makes the decision on what part to believe, as stated in Weaver v. Lentz, 561 S.E.2d at 365:

> [I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.

(quoting Small v. Pioneer Machinery, Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997); *see also* Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) ("As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness.").

On the issue of medical stability, the Plaintiff complains that the "Defense experts picked a definition of 'medically stable' that defies ordinary meaning and takes the statute beyond its intent," and argues that: "Based upon a medical dictionary definition of stable[8], Julia was medically stable throughout the shoulder dystocia." [Appellant's Brief, p. 17.] First, the Plaintiff did not ask the Trial Court to charge the jury on any definition of "medically stable." Nor, did the Plaintiff ever argue that the issue of medical stability was a subject within the common knowledge of the jury. *See* Babb v. Lee Cty. Landfill SC, LLC, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) (regarding need for expert opinion). Plaintiff presented testimony from her experts with their opinions that the Infant was medically stable, and the Defendant presented his experts with their opinions that the Infant was not medically stable. The Plaintiff had her opportunity to fully cross examine the Defense experts on their opinions on the issue of medical stability.[9] Rule 611(b),

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[8] Plaintiff is relying on an on-line medical dictionary: Merriam-Webster Medical Dictionary, https://www.merriam-webster.com/dictionary/stable#medicalDictionary. [Appellant's Brief, p. 17.]

[9] Notably, the Plaintiff's Counsel did not use the on-line dictionary in cross examination.

SCRE ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.") The question of which expert to believe was for the jury. State v. Johnson, 66 S.C. 23, 44 S.E. 58, 63 (1903) ("After expert testimony is admitted by the court, it is to be considered by the jury just as other evidence, and given such weight as, in the opinion of the jury, it should receive.") Accordingly, the Trial Court properly denied the motion for a directed verdict and the jury's verdict should not be overturned.

C. The evidence created a question of fact for the jury as to whether the Infant and Mother were "in immediate threat of death" or "in immediate threat of serious bodily injury."

Again, the Plaintiff's basic argument appears to be that there was no "immediate" threat because the Infant was safely delivered within 45 seconds. Plaintiff's expert, Dr. Pliskow, opined that neither the mother nor the baby were ever at risk of any harm during those 45 seconds. [ROA ___; Tr. 349:25-350:6, 365:20-23.] Another Plaintiff's expert, Dr. Resnick likewise opined that the Infant was not in any immediate threat of death or serious bodily injury in those first 45 seconds. [ROA ___; Tr. 579:12-17.] However, Dr. Resnick acknowledged that when an obstetrician is confronted with a shoulder dystocia emergency, he does not know how long it will take to resolve. [ROA ___; Tr. 585:14-17.]

Defense OB expert, Dr. Smithson, testified about the risk and the uncertainty of the timing and opined that the Infant was at a threat of immediate risk of brain damage and death the entire time the Infant's shoulder was stuck:

> Q [On direct]: And, Dr. Smithson, when you are presented with the shoulder dystocia during delivery, do you have any idea how long it's going to take to get that baby delivered?
>
> A: You have no idea, and that's the scariest part about it. You don't know what it's going to take, you don't know how long it's going to take, and you're not sure which maneuver is going to eventually release the shoulders and allow the baby to be born. [ROA ___; Tr. 790:4-11]

****

Q [On cross]: With a 45-second head-to-body interval and Apgars of 9 and 9, this child was not at immediate risk of brain damage or death, was she?

A: Again, you're speaking in hindsight. In the middle of the procedures, in the middle of the delivery, you have no idea how this book is going to end.

Q: Please answer my question, sir.

A: I cannot answer.

Q: During those 45 seconds, this child was never at immediate threat or risk of brain damage, was she?

A: This baby was at a threat of immediate risk of brain damage and death the entire time the baby was stuck. [ROA ___; Tr. 835:13-24. *See also* ROA ___; Tr. 859.]

Defense expert, Dr. Ernest, also testified about the immediate risk:

Q: So do you have an opinion whether there is an immediate risk of harm when presented with the medical emergency of shoulder dystocia?

A: Definitions are everything; right? And how do we define immediate? If immediate is if you don't fix it in a few minutes, there will be brain injury or death, then absolutely, and that's the situation. So I think most people would consider if you are at risk of dying unless something is done in 4 to 5 minutes that was immediate, yeah, I think it's an immediate risk. [ROA ___; Tr. 899:15-24. *See also* ROA ___; Tr. 895:2-18.]

While Dr. Ernest testified that the risk is low at 45 seconds, the point is that the risk still existed. [ROA ___; Tr. 992:9-12.]

As discussed above, Dr. Duchowny, Defense expert pediatric neurologist, also opined that the Infant was in immediate risk of either bodily harm or death: "I think she was in a very dangerous situation. There was immediate risk of either bodily harm or death. It's a very precarious situation and, in my opinion, very potentially dangerous." [ROA ___; Tr. 1060:22 -1061:3.] On cross examination, Dr. Duchowny testified about the time continuum of the danger zone and the increasing risk in shoulder dystocia cases:

> Q: Sure. It's your opinion obstetricians have over 5 to 6 minutes of lack of oxygen until there's a risk to the baby; true?
>
> A: In general, that's true, but there are two points to make here. One is that, firstly, it's different for every baby and, secondly, it's a continuum. It's not like suddenly a switch gets thrown at six minutes to say that you're in the danger zone. The longer the period of time that any of us are without oxygen, the higher the likelihood of some type of brain injury.
>
> Q: And I appreciate that, but the question was you know that obstetricians have over 5 to 6 minutes of lack of oxygen until there's a risk; true?
>
> A: Well, I'm sure I stated that and I think that is true, but you need to -- in general, as a statistic, a longer period of time, six minutes or so, is a cutoff that's used, but it's again, it's a very worrisome situation and it's potentially dangerous and there certainly are cases that have had a brain injury after only a couple of minutes of oxygen deprivation. So I mean this is a -- if there's any situation of oxygen deprivation, it is dangerous. [ROA ___-___; Tr. 1082:25-1083:20.]

Notwithstanding these conflicting expert opinions which create an issue of fact for the jury, the Plaintiff states as fact that "Dr. Browning admitted it was his personal belief that Julia was never in immediate threat of brain damage. (Tr. p. 731:5-8)." [Appellant's Brief, p. 7.] Thus, she argues that this admission entitles her to a directed verdict as a matter of law:

> [T]he defendant doctor clearly and unequivocally admitted there was no immediate risk of serious injury. As such, the defendant doctor's stated subjective belief that he never thought the patient was 'in immediate risk of serious harm required a finding that the obstetric emergency affirmative defense failed as a matter of law. [Appellant's Brief, p. 18.]

The record shows that the Appellant's representation of Dr. Browning' testimony is skewed and taken out of context.

Dr. Browning testified that he is worried about the patient from the very beginning whenever he is confronted with a shoulder dystocia:

> Q: When you are confronted with a shoulder dystocia, when do you start to worry about the welfare of your patient?
>
> A: Well, I'm worried from the get-go. [ROA ___; Tr. 668:13-15.]

The Plaintiff cites to page 731:5-8 in support of the "admission", but in the full context of that testimony, Dr. Browning explains that the threat of death is there from the very moment that the shoulder dystocia is recognized:

> Q: This child was never at immediate threat of brain damage in those 45 seconds, was she?
>
> A: No, but you're not -- what you're thinking is to resolve this right away in a correct fashion.
>
> Q: No patient was at risk or at immediate threat of death or serious permanent -- or serious bodily injury during those 45 seconds; true?
>
> A: Well, at the very start of recognizing the shoulder dystocia, that threat of brain injury, that threat of death is there. You go through your motions. You're not looking at the clock to resolve that problem. [ROA ___; Tr. 731:5-15.]

Dr. Browning explained the seriousness and immediacy of the risk in a shoulder dystocia emergency:

> Well, when the baby doesn't deliver right away, the cord is being compressed against where the cord comes out of the baby at the abdomen. It's on the floor of the maternal pelvis. And every minute that goes by, there's increasing risk to the fetus. You've heard a lot of numbers, but I will tell you that the numbers are variable and it depends, you know, on many, many things, but the longer -- the more time it takes to resolve the shoulder dystocia, the more risk of having gradual incremental brain injury and then death. [ROA ___; Tr. 667:8-18.]
>
> ****
>
> [A]s we told you before, you want to get the shoulder dystocia resolved as soon as you can. Increasing time, increasing risk. Increasing time, increasing maneuvers, increasing risk. [ROA ___; Tr. 731:1-4.]
>
> ****
>
> Well, at the very start of recognizing the shoulder dystocia, that threat of brain injury, that threat of death is there. You go through your motions. You're not looking at the clock to resolve that problem. [ROA ___; Tr. 731:12-15.]

There is no basis to reach any conclusion that Dr. Browning made a binding concession that entitles the Plaintiff to a directed verdict on the statutory obstetrical emergency exception. The Plaintiff

is only pointing to isolated answers to leading questions that, at worst, create a conflict in Dr. Browning's testimony that goes to his credibility, which is for the jury to assess and weigh with the other conflicting expert opinions.

In the case of Bonds v. Nesbitt, cited above, the Georgia Court addressed the issue that the physician's determination that a patient has stabilized is some evidence on the point, but it still leaves a question for the jury. 747 S.E.2d at 45. Likewise, also as discussed above, where a witness' own testimony may be conflicting, the jury makes the decision on what part to believe. Weaver v. Lentz, 561 S.E.2d at 365. In this case, the jury made its decision, and accordingly, the Court should affirm the judgment rendered on its verdict.

~~~~~

In the final analysis, this is a classic battle of the experts. The record contains conflicting expert opinions on whether the Mother and/or Infant's condition was "not medically stable," and whether the Mother and/or Infant was "in immediate threat of death" or "in immediate threat of serious bodily injury." Those conflicting opinions are more than sufficient to support the Trial Court's decision to send the Obstetrical Emergency Care Exception, §15-32-230, to the jury under the applicable directed verdict standard.

ADDITIONAL SUSTAINING GROUND

II. THE DEFENDANT PHYSICIAN IS ENTITLED TO JUDGMENT FROM ANY PERSONAL LIABILITY PURSUANT TO S.C. CODE ANN. §33-56-180, BECAUSE HE WAS EMPLOYED BY A CHARITABLE ORGANIZATION AND THE JURY FOUND THAT HE WAS NOT GROSSLY NEGLIGENT.

S.C. Code Ann. § 33-56-180 provides limitations of liability for injury or death caused by an employee of a charitable organization, which include a monetary cap on actual damages and immunity for the employee unless reckless, wilful, or gross negligence is proven:
~~~~~

> (A) A person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15. An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, wilful, or grossly negligent manner, and the employee must be joined properly as a party defendant. A judgment against an employee of a charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, wilful, or grossly negligent manner. If the charitable organization for which the employee was acting cannot be determined at the time the action is instituted, the plaintiff may name as a party defendant the employee, and the entity for which the employee was acting must be added or substituted as party defendant when it reasonably can be determined.

The Defendants presented testimony and documentary evidence that Dr. Browning was an employee of McLeod Physician Associates II, a §501(c)(3) corporation, at the time in question. [ROA ___, ___; Tr. 608:13-25, 611:16-18. *See also* ROA ___, ___; Court's Ex. # 2 & #3.] The Trial Court ruled: "For the record, based on the evidence presented to me, I'm going to find that Dr. Browning's employer at the time of the incident which is the subject matter of this action was McLeod Physician Associates II." [ROA ___; Tr. 622:18-22.] The Trial Court further ruled that §33-65-180 applies: "For the record, I am going to grant the directed verdict motion to limit liability and strike punitive damages as it applies to McLeod Physicians Associates II only.". [ROA ___; Tr. 628:7-10.] Since the Plaintiff has not challenged those rulings on appeal, they are the law of the case. Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 245, 608 S.E.2d 134, 137 (Ct. App. 2004) ("[T]he circuit court's unappealed finding ... is the law of the case."). In addition, the Plaintiff did not move for a directed verdict on gross negligence. [ROA ___, ___; Tr.1103:10-19, 1164:4-7.]

The Trial Court charged the jury on the charitable immunity statute:

> Dr. Browning is named individually as a defendant in this case. He is an employee of McLeod Physicians Associates II. McLeod Physicians Associates II is a charitable organization. A judgment against an employee of a charitable organization may not be returned unless a specific finding is made that the employee act -- acted in a reckless, willful or grossly negligent manner. However, a judgment may be returned against a charitable organization on a finding of ordinary negligence. [ROA ___; Tr. 1240:18-22.]

The Plaintiff did not except to the charge. [ROA ___, ___; Tr. 1040:2, 1254:6.] The question posed to the jury on the verdict form asked: "Did Defendant Dr. John B. Browning act in a manner that was grossly negligent?" The jury answered "no." [ROA ___; Verdict.] The Plaintiff approved the verdict form: "MR. RUFFIN: I think it's good." [ROA ___; Tr. 1164:14.]

Since the Plaintiff did not preserve any issue for appeal on the jury's finding that Dr. Browning was not grossly negligent, Dr. Browning is entitled to judgment from any personal liability. *See* Stephens v. CSX Transp., Inc., 415 S.C. 182, 196, 781 S.E.2d 534, 541 (2015) (plaintiff waived argument for partial directed verdict on an issue by approving the special verdict form); O'Leary-Payne v. R.R. Hilton Head, II, 638 S.E.2d at 101 (challenge to sufficiency of evidence on an element is not preserved if not raised in the directed verdict motion).

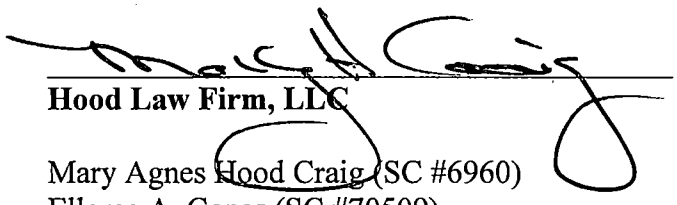
CONCLUSION

WHEREFORE, based on the foregoing, the Respondents respectfully submits that the Trial Court properly submitted the Emergency Obstetrical Care Exception, S.C. Code Ann. § 15-32-230, to the jury where the Patient conceded that the presentation of shoulder dystocia constituted a genuine emergency situation and there is evidence – even if conflicting – that the Infant and Mother were not medically stable and they were in immediate threat of death or serious bodily injury. Accordingly, the Court should affirm the jury's verdict in favor of the Respondents.

In addition, the Court should affirm the jury's verdict in favor of Respondent Dr. John Browning on the additional sustaining ground that he is immune from any personal liability

pursuant to S.C. Code Ann. §33-56-180, because he was employed by a charitable organization and the jury found that he was not grossly negligent.

Respectfully submitted,



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April 11, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2013-CP-21-00690
Appellate Case No. 2016-001551

Christy Bryd, as Next Friend of Julia B., a minor,

Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning,

Respondents.

Certificate of Service

The undersigned certifies that on this 11th day of April, 2017, a copy of the Initial Brief and Designations on behalf of Respondents McLeod Physician Associates II and Dr. John B. Browning, were served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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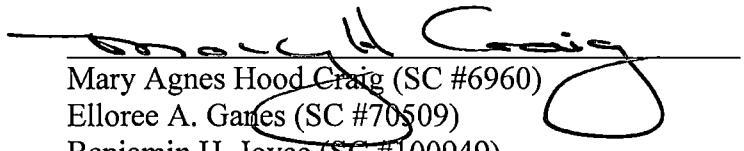

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April 11, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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Re: Christy Byrd, as Next Friend of Julia Byrd, a minor v. McLeod Physician Associates II and Dr. John B. Browning,
C/A No. 2013-CP-21-00690, Florence CP
Appellate Case No. 2016-001551
HLF File No. 25.056

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Respondents' Initial Brief and Designations of Matter to Include in the Record in the above matter, along with the Certificate of Service. I am serving all counsel of record with copies of the each. Please return a clocked-in copy of each in the envelope provided.

Kind regards,

Yours truly,

Molly H. Craig

MHC/spc
Enclosure(s)
cc: Edward L. Graham, Esquire/Diane Rodriguez, Esquire

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